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LIBERTY'S CORNER

"TRADING LIBERTY FOR SAFETY" ***The Federal Lawyer*** for January 2003, in its cover story "***Constitutional Issues After 9/11: Trading Liberty for Safety***," by Michael Linz and Sarah Meltzer, sums up many governmental actions that have previously been reported in ***Federally Speaking's "Liberty's Corner,"*** and which they refer to as having "needlessly placed in jeopardy fundamental liberties that are embodied in the **Constitution**," including the **USA PATRIOT Act** ("an acronym for 'Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism'"), Military Tribunals, Denial of Counsel, Secret Imprisonments without Charges, Governmental Spying, the Palmer-style Ashcroft Raids, the Creppy Directive, etc. They conclude that history "***shall judge***" whether those "who would dare question its [the Administration's] judgments … 'only aid terrorists'" by, as Attorney General Ashcroft cautioned **Congress**, scaring "peace-loving people with phantoms of lost liberty;" or "if the government's actions … like the Palmer Raids and the internment of America's Japanese citizens, [constitute] reprehensible conduct unbefitting our great nation." **[25]**

MILITARY TRIBUNALS. **Military Tribunals**, when last used during a declared war (World War II) to deal with a very limited number of Nazi war criminals and saboteurs, ***and when authorized by Congress***, have been upheld by the **U.S. Supreme Court** in "emergency situations" (***Ex Parte Quirin,*** 317 U.S. 1 (1942))." However, even such **Congressionally** authorized **Tribunals** are only sanctioned "from [war's] declaration until peace is declared" (see ***In re Yamashita***, 327 U.S. 1, 11-12 (1946)). During this same declared war, our **Government** interned U.S. citizens of Japanese extraction, which was subsequently held to be **unconstitutional**, and for which reparations were paid by our **Government**. As George Santayana has cautioned: "Those who cannot remember the past are condemned to repeat it." **[11]**

PALMER RAIDS. U.S. Attorney General Alexander Mitchell Palmer, after the June 2, 1919 bombings in Washington, DC (damaging his residence) and in seven other American cities,

conducted a series of so-called "**Palmer Raids,**" with his new lieutenant J. Edgar Hoover, rounding up without warrants roughly 16,000 radicals and leftists, mainly foreigners. In light of Sacco and Vanzetti's Italian immigrant and anarchist status, could they have received a fair trial in this era of the "Red Scare," bombings by radicals, "**Palmer Raids**," predictions of a domestic communist revolution, and the 1919 and 1920 expulsions of an elected Socialist from Congress (Pacifist Victor Berger from Wisconsin, whose conviction for sedition was thrown out by the **U.S. Supreme Court [*Berger v. U.S.*, 255 U.S. 22 (1921)]**, after sentencing Judge Kenesaw Mountain Landis had remarked that he regretted the law did not allow him "to have Berger lined up against a wall and shot")? On circumstantial evidence alone, Sacco and Vanzetti had been found guilty of robbery and murder on July 14, 1921, and sentenced to death. Following this "ultimate sentence," Judge Webster Thayer, their Boston-area trial judge, reportedly boasted: "Did you see what I did with those anarchist bastards the other day?" Seven years later, after many appeals and much public outcry, both "anarchist bastards" were executed. Some commentators have noted similarities between post-6/2/19 America and post-9/11/01 America. **[20]**

THE CREPPY DIRECTIVE. Rabih Haddad's "Star-Chamberesque" **Immigration Deportation Hearings** for overstaying his 1998 six-month tourist visa must be open to the press and the public, as must all cases classified as "special interest" by the office of Chief Immigration Judge Michael Creppy. So ruled U.S. District Court Judge Nancy Edmunds of the Eastern District of Michigan. This classification, which was adopted at the behest of the U.S. Justice Department by Judge Creppy on September 21, 2001 in a document known as the "**Creppy Directive**," has led to the closure of hundreds of immigration hearings, and was applied to post-9/11 cases when the Justice Department alleged that an open hearing could jeopardize national security. "It is important for the public, particularly individuals who feel that they are being targeted by the government as a result of the terrorist attacks of September 11," Judge Edmunds noted, "to know that even during these sensitive times the government is adhering to immigration procedures and respecting individuals' rights." See "***Judicial Supervision*, A Really Creppy Directive?**," ***infra***, for more of the story. **[15]**

SUPREME COURT STRUGGLES WITH BOUNDARIES. In the following weighty two "ton" cases of ***Drayton*** and ***Stratton***, decided recently on the same day, June 17, 2002, the **U.S. Supreme Court** expanded one **constitutional** boundary and narrowed another, in both with eyes over their shoulders looking out for international and/or domestic "terrorists:"

a) **FIRST AMENDMENT - EXPANDED.** In ***Watchtower Bible and Tract Society Of New York, Inc., v. Village Of Stratton,*** 536 U. S. 150 (2002), a Stratton ordinance made it a misdemeanor to engage in door-to-door solicitation without first registering with the mayor and receiving a permit. The 8-1 majority found the ordinance **unconstitutional** as violating the **First Amendment free speech rights** protecting: a) ***anonymous*** political speech; b) door-to-door religious proselytizing, espousal of unpopular causes and non-commercial solicitation; and c) the distribution of handbills. Chief Justice Rehnquist, the sole dissenter, in arguing against declaring this Stratton ordinance **unconstitutional,** recounted the following horror story: "Two teenagers murdered a married couple of Dartmouth College professors, Half and Susanne Zantop, in the Zantop's home. Investigators have concluded, based on the confession of one of the teenagers, that the teenagers went door-to-door intent on stealing access numbers to bank debit cards and then killing their owners…. Their ***modus operandi*** was to tell residents that they were conducting an environmental survey for school…. They were allowed into the Zantop home. After conducting the phony environmental survey, they stabbed the Zantops to death." The majority, however, found that the Village had failed to establish that the rights of unfettered public discourse and anonymous free speech were outweighed by the public policy concerns of

preventing crime and protecting the villagers' privacy, especially as there was no evidence in the record of a special crime problem relating to door-to-door solicitation. **[18]**

B) **FOURTH AMENDMENT - NARROWED.** In the other case, ***United States V. Drayton***, 536 U. S. 194 (2002), a 6-3 majority found that the **Fourth Amendment prohibition against illegal searches and seizures,** does not require police officers to ***advise*** bus passengers of their right ***not*** to cooperate and their right to ***refuse*** consent to the search, as the "officers gave the passengers no reason to believe that they were required to answer questions." The majority grounded there opinion here on their earlier case of ***Florida v. Bostick***, 501 U.S. 429 (1991) which they advised held that the "**Fourth Amendment** permits police officers to approach bus passengers at random to ask questions and to request their consent to searches, ***provided a reasonable person would understand that he or she is free to refuse***" (emphasis added). The majority did acknowledge that the ***Bostick*** Court "identified two factors "particularly worth noting'," to wit: "First, although it was obvious that an officer was armed, he did not remove the gun from its pouch or use it in a threatening way. ***Second, the officer advised the passenger that he could refuse consent to the search***"(emphasis added). Here there were three officers strategically placed, one of whom advised Drayton that he was looking for weapons and drugs, and requested and received permission from Draytron to search him. He, however, had not advised Drayton that he could refuse to be searched. The officer arrested Drayton when the search revealed that drugs were strapped to his body. The three-Justice minority seemed to view the real-life circumstances differently than the majority. As reasoned by Justice Souter, who was in the majority in ***Bostick***, writing for the minority here: "Anyone who travels by air today submits to searches of the person and luggage as a condition of boarding the aircraft. It is universally accepted that such intrusions are necessary to hedge against risks that, nowadays, even small children understand. The commonplace precautions of air travel have not, thus far, been justified for ground transportation, however, and no such conditions have been placed on passengers getting on trains or buses. There is therefore an air of unreality about the Court's explanation that bus passengers consent to searches of their luggage to 'enhanc[e] their own safety and the safety of those around them'." Applying "***Bostick's*** totality of circumstances test, and to ask whether a passenger would reasonably have felt free to end his encounter with the three officers by saying no and ignoring them thereafter…. the answer is clear. The Court's contrary conclusion tells me that the majority cannot see what Justice Stewart saw" in ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980), the effect of the "threatening presence of several officers." It is interesting to note that the majority found the non-compliance advisory, as admittedly given in ***Bostick,*** to be unnecessary "here and now." [**18]**

ETHICAL CONSIDERATIONS

A) UNPUBLISHED OPINIONS

THE PUBLICATION DILEMMA. The **U.S. Court of Appeals for the Sixth Circuit,** in discussing the necessity for openness in court proceedings, recently cautioned: "Selective information is misinformation;" and "Democracies die behind closed doors" (***Detroit Free Press v. Ashcroft***, No. 02-1437, 6th Cir, August 26, 2002; see also ***Federally Speaking***, No. 20, "**Creppy Directive Revisited**"). While this was directed towards the **Executive Branch** and secret trials, some commentators have suggested that the **Judicial Branch** should also be examining its own house. Why? At the 1964 **Judicial Conference of the United States,** apparently in light of the proliferation of judicial opinions, it was resolved that "the judges of the **courts of appeals** and the **district courts** authorize the publication of only those opinions which are of general precedential value and that

opinions authorized to be published be succinct." This resolution has apparently borne fruit as it has been reported that now approximately three-fourths of these courts' opinions are not officially published (Administrative Office of the United States Courts Report, Judicial Business Table S-3 (1999)), and six out of the thirteen circuits do not even allow citation to such unpublished opinions "except to support a claim of res judicata, collateral estoppel or law of the case" (Strongman, "***Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional,"*** 50 U. Kan. L. Rev. 195, 199 (2001)), even when available on the Internet. [The Third Circuit does not prohibit citation.] In 2000, a unanimous Eighth Circuit three-judge panel, in an opinion written by Circuit Judge Richard S. Arnold (then a potential Clinton **U.S. Supreme Court** nominee), held that its own **Rule 28A(i)** against recognizing unpublished opinions as precedent was "**unconstitutional**," as it purported "to confer upon the courts a power that went beyond the 'judicial,' within the meaning of **Article III of the Constitution**." Fellow Circuit Judge Gerald W. Heaney went so far as to write in a separate concurrence: "I agree fully with Judge Arnold's opinion. He has done the public, the court, and the bar a great service by writing so fully and cogently on the precedential effect of unpublished opinions" (***Anastasoff v. U.S.***, 223 F.3d 898 (8th Cir. 2000)). Ironically (or politically), the **IRS**, who had successfully urged the giving of precedential effect to the unpublished per curiam tax refund opinion in ***Christie v. U.S.***, No. 91-2375MN (8th Cir., March 20, 1992), abruptly abandoned its winning position and the favorable holding of ***Christie,*** and paid Anastasoff her complete, but allegedly "untimely" applied for, $6,436.00 tax refund, plus interest. The **Eighth Circuit** then, sitting ***en banc***, in an opinion also attributed to Judge Arnold, unanimously declared ***Anastasoff*** to be moot and announced that the "**constitutionality** of that portion of **Rule 28A(i)** which says that unpublished opinions have no precedential effect remains an open question in this **Circuit**" (***Anastasoff v. U.S.***, 235 F.3d 1054 (8th Cir. 2000)). But was Arnold really right in the first place? In the law review article, "***Stalking Secret Law,***" Merritt and Brudney paint a very scary picture (54 Vand. L. Rev. 71, 119 (2001)). They report that in their survey of such opinions, not only did "the unpublished opinions we studied included a surprising number of reversals, dissents, and concurrences," but "we discovered that outcomes among unpublished opinions showed significant associations with political party affiliation, specific professional experiences, and other characteristics of judges adjudicating the cases. Together, these findings suggest that panels authoring unpublished opinions reach some results with which other reasonable judges would disagree," which "raises the very specter described by the **Eighth Circuit**" in ***Anastasoff***, that "like cases will be decided in unlike ways," and that "judges' decisions will be 'regulated only by their own opinions'" (see also 1 Blackstone Commentaries 258-59). This then is the publication dilemma. **[21]**

UNPUBLISHED RULE 32.1. It has been predicted that the unpublished opinion dilemma (***The Publication Dilemma***, ***Federally Speaking,*** No. 21) could be solved with the adoption by the **U.S. Supreme Court** in April 2005 of the yet unfinalized and unpublished Uniform Rule 32.1 (ABAJournal eReport, 12/13/02). **[25]**

B) CRTICISM OF JUDGES AND JUDICIAL PROCEEDINGS

FOOTNOTE IN MOUTH DISEASE! What if any action should be taken against an **Officer of the Court** who maligns a Court or a member of a Court in a filed or published document? For instance, what about writing: 1) "Seldom has an opinion of this court rested so obviously upon nothing but the personal views of its members;" or that a justice's views are "irrational" and "cannot be taken seriously?" 2) That a study "discovered that outcomes among unpublished opinions showed significant associations with political party affiliation, specific professional experiences, and other

characteristics of judges adjudicating the cases?" 3) That an "opinion is so factually and legally inaccurate that one is left to wonder whether the court of appeals was determined to find for appellee" and "said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)?" 4) Any of the many sharply barbed and gory attacks by **Officers of the Court** and **Members of the Bar** on various **U.S. Supreme Court** decisions, including ***Brown v. Board of Education,*** 347 U.S. 483 (1954) and ***Bush v. Gore,*** 531 U.S. 98 (2000)? Are these instances of constitutionally protected **First Amendment** free speech "within the broad range of protected fair commentary on a matter of public interest," and/or merely forms of "rhetorical hyperbole incapable of being proved true or false," as dissenting Indiana Supreme Court Justices Frank Sullivan Jr. and Theodore Boehm found in ***In Re Wilkins,*** **Case No. 49S00-0005-DI-341** (October 29, 2002), with regard to one of these instances; or would these be "scurrilous and intemperate attack[s] on the integrity of the court" (***Michigan Mutual Insurance Company v. Sports Inc***., 706 N.E.2d 555 (Ind. 1999)), mandating sanctions against the offending individuals? For your information, the first are examples of the comments of **U.S. Supreme Court** Justice Antonin Scalia in his published opinions in ***Atkins v. Virginia,*** 536 U.S. 304 (death penalty), and in ***Webster v. Reproductive Health Services,*** 492 U.S. 490 (1989) (referring to fellow Justice Sandra Day O'Connor), respectively. The second is a report of a judicial survey appearing in ***Federally Speaking,*** No. 21. The third is the "scurrilous and intemperate" or, perhaps, **constitutionally** protected, footnote of Michael Wilkins, Esq. from ***Michigan Mutual, supra***, sanctions for which were affirmed 3-2 ***In Re Wilkins***, under the Indiana version of ABA Model Rule of Professional Conduct 8.2. And the last is what Justice Boehm found this offending footnote to be similar to in his ***Wilkins*** dissent. Then, too, should Justice Robert Rucker, a member of both the majority in ***Wilkins*** and the lower court panel Wilkins chastised, have also participated at the higher level? If the Indiana Supreme Court does not reconsider, the **First Amendment** protected speech issue may yet reach the **U.S. Supreme Court,** which has already "made it clear that 'disciplinary rules governing the legal profession cannot punish activity protected by the **First Amendment**.' ***Gentile v. State Bar of Nev.***, 501 U.S. 1030, 1054 (1991)" (**Wilkins dissents,** ***supra***). One wonders as to the affect of Justice Scalia's utterances then, or who after the dust clears will have the "disease" of one's foot (or "footnote") in one's mouth. **[23]**

C) JUDICIAL SUPERVISION

Federal Judiciary key to sustaining liberty! "The rights that **Americans** enjoy as the core of their ***liberty*** would be worthless, mere words on paper, unless an ***independent judiciary*** existed with the authority and ***the will*** to enforce them. … ---the possibility that **Federal Judges** may actually uphold fundamental rights, at whatever cost to the **Judges** themselves, is what, together with many soldiers' blood, has made our ***liberty*** endure. Thus no explosive device can even touch the edifice of ***Justice*** that upholds our ***liberty***. The only way that ***Temple*** can become rubble is if **Judges** themselves allow others to pull its column down" (**U.S. District Judge** Stewart Dalzell of the **Eastern District of Pennsylvania**, January 18, 2002; emphasis added.) We have also previously quoted in this column **United States Supreme Court** Justice Sandra Day O'Connor, quoting Margaret Thatcher: "Where law ends, tyranny begins" (see ***infra***). There is now one more quote to add, a direct quote, from **United States Supreme Court** Justice David H. Souter: "When you are dealing with people, be careful!" At the post-9/11 **2001 Third Circuit Judicial Conference**, Justice Souter thus cautioned, using an extensive discussion of the Japanese internment litigation and the surrounding subsequently condemned Governmental actions, as illustrative of what disregard for this caution, and presumably the cautions quoted herein of Prime Minister Thatcher, Statesman Franklin and Historian Santayana, could cause. (Former Pennsylvania Governor, **Homeland Security Director**, and now **Secretary of Homeland Security,** Tom Ridge, as he left for the **Nation's Capital** stated, quoting Benjamin

Franklin: "Those that can give up essential **liberty** to purchase a little temporary safety deserve neither **liberty** nor safety;" and George Santayana has cautioned: "Those who cannot remember the past are condemned to repeat it.") **[13 & 11]**

"WHERE LAW ENDS, TYRANNY BEGINS!" "Where law ends, tyranny begins," so said United States Supreme Court Justice Sandra Day O'Connor, quoting Margaret Thatcher, on the occasion of Justice O'Connor being awarded the first "Carol Los Mansmann Award for Distinguished Public Service" by the Western Pennsylvania Chapter of the Federal Bar Association, before a packed house of 1000 well-wishers in the Duquesne University Student Union Ballroom. She was driving home the point that in light of the recent terrorist attacks the rule of law must be maintained. "The need for lawyers does not diminish in times of crisis," she stressed, "it only increases." Your columnist had the honor of presenting her with this award and "pinning" the "Honorable" Honorary FBA Member O'Connor with an FBA recognition pin. The Carol Los Mansmann Award for Distinguished Public Service will be awarded annually by the West Penn Chapter, in conjunction with the Duquesne University School of Law, to "a public figure who has made unique and outstanding contributions to the legal profession through diligence, dedication to principle, and commitment to the profession's highest standards," attributes exemplified by U.S. Court of Appeals Third Circuit Judge Carol Los Mansmann, who passed away shortly thereafter. **[9 & 14]**

THIRD CIRCUIT AND WDPA JUDGES SPEAK OUT: "Good judges … try and get it right." With these words the newest member of the **U.S. Circuit Court of Appeals for the Third Circuit**, **D. Brooks Smith**, left behind the exhilaration of the Chief Judgeship of the U.S. District Court for the Western District of Pennsylvania, and the acrimony of the U.S. Senate confirmation process, and confirmed to all that he places "real people" and their very real particular "cases" above all. After being sworn in and donning his appellate robe, he stressed that "good judges must always keep in mind the sacred trust they hold;" good judges must "decide cases," not broad issues; good judges "must remember real people are affected by our decisions;" good judges must "recognize their own fallibility … and at the end of the day, try and get it right." He then pledged, "I will try my utmost to be a good judge." Then too, with regard to "trial by jury," **Senior U.S. District Judge Donald J. Lee** stresses: "Trial by jury is a fundamental concept in our American system of justice, and it has been instrumental in the preservation of individual rights while at the same time serving the interests of society in general;" and **U.S. District Judge Robert J. Cindrich** cautions: "Too many people take for granted the great blessings our democracy has bestowed upon us and our children. It is clear to me that you are aware that a democracy is not self-effectuating and that it demands the ongoing, active participation of the citizenry if it is to endure." **[21 & 24]**

THE MAGIC LANTERN OF JUDICIAL SUPERVISION. When we think of a "Magic Lantern" we envision a primitive "moving" picture device or, perhaps, Aladdin rubbing his Genie generator. No longer. In the 21st Century "Magic Lantern" will now refer to a "Trojan Horse" type computer program. According to **PC World**, Magic Lantern is being developed by the **FBI** to be planted by an agent "in a specific computer by using a virus-like program." Once planted, this keystroke logger "will render encryption useless on a suspect's computer" by capturing "words and numbers as a subject types them (before encryption kicks in), and will transmit them back to the agent." According to **FBI** spokesperson Paul Bresson: "It's no secret that criminals and terrorists are exploiting technology to further crime. The **FBI** is not asking for any more than to continue to have the ability to conduct lawful intercepts of criminals and terrorists." Jim Dempsey, Deputy Director of the **Center for Democracy and Technology**, is concerned about the lack of prior notice of such "searches and seizures" as required by the **Fourth Amendment** to the **U.S. Constitution**: "In order for the government to seize your diary or read your letters," Dempsey advises, "they have to knock

on your door with a search warrant," but Magic Lantern "would allow them to seize these without notice. … The program would not only capture messages you sent, it would capture messages that you wrote but never sent." The main concern here appears not to be the use of new technologies, but the apparent lack of appropriate **judicial supervision**. Previously, **Federally Speaking** has reported on the use by agencies such as the **FBI** of "Carnivore" devices, which scan "through tens of millions of e-mails and other communications from innocent Internet users as well as the targeted suspect" (***Federally Speaking***, No. 8), and how the **Patriot Act** tries to regulate their use "by excluding general access to the 'content' of the messages and by requiring Carnivore Reports to **Congress**" (***Federally Speaking***, No. 10). Perhaps what is truly needed is the light of the "Magic Lantern" of **judicial supervision** to keep out the darkness of the Trojan Horses of the overzealous? **[13]**

FISA: "COMES CLOSE" TO MINIMUM FOURTH AMENDMENT STANDARDS. Curt Anderson of Associated Press reported that in ***In Re: Sealed Case No. 02-001*** (FISCR 2002), "a trio of … semi-retired judge[s] on the **U.S. Court of Appeals** … appointed by President Reagan" and "named by **U.S. Supreme Court** Chief Justice William Rehnquist" to the "**U.S. Foreign Intelligence Surveillance Court of Review**," overturned the unanimous decision of seven (7) other Federal Judges (later joined by an eighth) forbidding "law enforcement officials" from "directing or controlling … the use of the **FISA** procedures to enhance [non-espionage] criminal prosecution" (see ***Federally Speaking***, No. 20). Thus, the **FISA** wall (50 U.S.C. 1801, et seq), erected to curb alleged **Federal Agencies'** abuses of the rights of American citizens, seems to have been torpedoed. Even though these apparently "hand picked" judges acknowledged that the **U.S. Supreme Court** in ***City of Indianapolis v. Edmond***, 531 U.S. 32 (2000) "cautioned that the threat to society is not dispositive in determining whether a search or seizure is reasonable," they allegedly so ruled because they had "learned" that "effective counterintelligence … requires the wholehearted cooperation of all the government's personnel who can be brought to the task," and that a "standard which punishes such cooperation could well be thought dangerous to national security." They also promulgated the novel "come close" rule that as "the procedures and government showings required under **FISA** … come close" to meeting "the minimum **Fourth Amendment** warrant standards … **FISA** as amended is **constitutional** because the surveillances it authorizes are reasonable." Thus, if we "come close" to obeying the law we're okay, right? According to Anderson, while the "government has sole right of appeal … attorneys were exploring other ways of getting the case to the High Court." **[24]**

A REALLY CREPPY DIRECTIVE? The **Third Circuit** two-judge majority in ***North Jersey Media Group v. Ashcroft*** (3rd Cir 2002; No. 02-2524), in reversing the lower court's ruling that a blanket directive for closed "undercover" deportation hearings was **unconstitutional,** cautioned that they "are keenly aware of the dangers presented by deference to the executive branch when **constitutional liberties** are at stake, especially in times of national crisis, when those liberties are likely in greatest jeopardy." As of this writing seven (7) **Article 3** U.S. Federal Judges have found the **Creppy Directive's** blanket closure of all special interest deportation hearings to be **unconstitutional**, and only the above two have found it **constitutional.** Those finding it **unconstitutional** are U.S. Circuit Judges Daughtrey, Keith and Scirica, and U.S. District Judges Bissell, Carr, Edmunds and Kessler. Moreover, according to the **Third Circuit** majority opinion in ***North Jersey Media Group v. Ashcroft*** (3rd Cir 2002; No. 02-2524), such **"unconstitutional"** findings were done with such "eloquent language" as "Democracies die behind closed doors, . . . When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation;" to which Judge Kessler added, "secret arrests are a concept odious to a democratic society" (see ***Federally Speaking,*** Nos. 15, 17 and 20). These **Article 3** Judges believe that **constitutionally** deportation hearings may only be closed, on a case-by-case basis, by the Immigration Judge hearing the matter, not by a general "directive" (see ***Detroit Free Press v.***

Ashcroft, 2002 U.S. App. LEXIS 17646 (6th Cir. 2002)). Interestingly, the **Third Circuit** decision upholding the Creppy Directive was handed down only after the rulings by the **U.S. District Court for the District of New Jersey** and the **Third Circuit,** itself, denying the Government's motion for a stay pending appellate review of the **District Court's** finding of **unconstitutionality**, were overturned by the **U.S. Supreme Court** granting this stay ("The application for stay presented to Justice Souter and by him referred to the Court is granted, and it is ordered that the preliminary injunction entered by the **United States District Court for the District of New Jersey** on May 28, 2002, is stayed pending the final disposition of the government's appeal of that injunction to the **United States Court of Appeals for the Third Circuit;**" ***Ashcroft v. North Jersey Media Group***, 536 U.S.___, **No.** 01A991, June 28, 2002). The two-judge Third Circuit majority apparently based this reversal on a finding that "openness" does not "plays a positive role" in immigration proceedings because they believed "the Government presented substantial evidence that open deportation hearings would threaten national security." They also apparently found some solace in their belief that even without an open hearing "these aliens are given a heavy measure of **due process** -- the right to appeal the decision of the Immigration Judge (following the closed hearing) to the **Board of Immigration Appeals (BIA)** and the right to petition for review of the **BIA** decision to the **Regional Court of Appeals**. See also ***INS v. St. Cyr***, 533 U.S. 289, 300 (2001) (noting that because the Constitution 'provides the **Writ of Habeas Corpus** shall not be suspended, . . . some judicial intervention in deportation cases is unquestionably required by the **Constitution'**)." However, Judge Scirica strongly dissented, finding that for "these" people, and for "all of the people," "the requirements of the test [in ***Richmond Newspapers, Inc. v. Virginia***, 448 U.S. 555 (1980)] are met. … Deportation hearings have a consistent history of openness" and the '**Supreme Court** … in both ***South Carolina Port Authority*** [***FMC v. South Carolina State Ports Authority***, 122 S. Ct. 1864 (2002)] and ***Butz*** [***Butz v. Economou***, 438 U.S. 478, 513 (1978)] concluded that **constitutional** principles applicable to civil cases were relevant to the administrative proceedings at issue. … Accordingly, the demands of national security under the logic prong of **Richmond Newspapers** do not provide sufficient justification for rejecting a qualified right of access to deportation hearings in general. … There must be **'a substantial probability'** that openness will interfere with these interests … [and] deference is not a basis for abdicating our responsibilities under the **First Amendment**. … ***United States v. Robel***, 389 U.S. 258, 264 (1967) (… 'Implicit in the term national defense is the notion of defending those values and ideals which set this Nation apart.'). … But a case-by-case approach would permit an Immigration Judge to independently assess the balance of these fundamental values. Because this is a reasonable alternative, the **Creppy Directive's** blanket closure rule is **constitutionally infirm**. As the **Supreme Court** reasoned in ***Globe Newspaper*** … 'a mandatory rule requiring no particularized determinations in individual cases, is **unconstitutional**.'" (***Globe Newspaper Co. v. Superior Court,*** 457 U.S. 596 (1982). One wonders whether the granting of the stay by the **U.S. Supreme Court** influenced or even re-directed the outcome in the **Third Circuit**. In any event, if not modified by the **Third Circuit** sitting **en banc**, with such a "conflict between the circuits," this question is certainly ripe for the granting of **certiorari** by the **U.S. Supreme Court**. **[22 & 24]**

EARL OF ASH ALLEGEDLY USURPS HIGH COURT AUTHORITY. In two back-to-back official **Administrative Branch** actions, it has been alleged that the Earl of Ash is "croftily" trying to seize the reins of power from the **Judicial Branch**, usurping the **High Court's** authority:

A) DENIES ATTORNEY/CLIENT PRIVILEGE. It has been asserted that the Earl of Ash "croftily" reversed the **U.S. Supreme Court's** holding in ***Hunt v. Blackburn***, 128 U.S. 464, 470 (1888), that communications between a client and his attorney must be "safely and readily availed of" and "free from consequences of apprehension of disclosure," in the name of anti-terrorism, by

authorizing the eavesdropping on **Attorney/client** telephone conversations, and the monitoring of attorney/client mail, when he, Ashcroft, concludes that there is a "reasonable suspicion" that such communications related to future terrorist acts (which authorization became effective even before it was published in the **Federal Register** on October 31, 2001). In defense of this action, Earl Ash left his "Croftdom" to appear before King Larry and plead his case to the Court of Public Opinion. "We're talking" only "about 13 prisoners nationally in the United States of America whom we have reason to believe would be seeking to continue with criminal activity while they are in jail," though apparently acknowledging later, that of "the 13" only "some are terrorists" (Larry King Live, November 2, 2001). However, all the Earl needs to do here is to utilize a long-standing exception to the **attorney-client privilege**, which allows a judge to permit such actions if he/she finds that such communication is aimed at furthering criminal activity. Not only would this preserve our **liberty**, but also it would allow the **Judiciary** to fulfill its role of protecting our **Constitutional** due process rights**. [11]**

B) **"Ashcroft Directive" OVERTURNS STATE LAW.** Also, in apparent disregard of the **Judicial Branch's** and the **High Court's** ultimate exclusive authority to declare **State** statutes **unconstitutional** and to delineate the **Constitutional** boundaries between **State** and **Federal** sovereignty, **Attorney General** Ashcroft nullified the Oregon "Right to Die" statute by publishing "the so-called '**Ashcroft Directive**'" in the **Federal Register,** declaring that medical doctors who prescribe **federally controlled substances** in conformity and compliance with this **State** law would violate and lose their **Federal Licensure**. Under the Oregon law, if two doctors agree on euthanasia and the patient has less than six months to live, a doctor may prescribe, but not administer, a lethal dose to such a terminally ill adult Oregon State residents, provided that the one to die is both able to make health care decisions for oneself and has voluntarily chosen to die. Subsequently, **U.S. District Court** Judge Robert E. Jones for the **District of Oregon** permanently enjoined Earl Ash "from enforcing, applying, or otherwise giving any legal effect to the **Ashcroft Directive**" (emphasis added). **[11 & 16]**

D) DEATH PENALTY

DEATH BY SANITY. The **U.S. Supreme Court** has forbidden the execution of the criminally insane (***Ford v. Wainwright***, 477 U.S. 399 (1986)). A recent episode of ***The Practice*** portrayed a Death Row inmate who had regained her sanity and become a "valuable member of society" through the post-conviction use of anti-psychotic drugs. To save her life, her attorney had her taken off this medication so she would revert to her psychotic "insane" state, to be immune from execution. Bizarre? Apparently not! Just turn the channel to "real life," to Steve Barnes' article in ***The NW Arkansas Morning News*, "*Death Case 'Weird and Complicated'.*"** There you will read about Charles Singleton who in 1979 at 19, while robbing a grocery store, stabbed and killed Mary Lou York. Since being on Death Row he has suffered "at least one, and possibly two or more, disabling mental illnesses for which he has been administered anti-psychotic drugs, sometimes against his will…. Jeff Rosenzweig, Singleton's attorney, … contends that the state of Arkansas, through its Department of Correction, is medicating an inarguably insane man into something approximating sanity solely for the purpose of putting him to death." Now, according to Kelly P. Kissel of the ***Associated Press***, a "sharply divided **Eighth US Circuit Court of Appeals**" sitting ***in banc***, and reversing its panel's earlier ruling "that Singleton be sentenced to life in prison without the possibility of parole," has ruled that Singleton "a paranoid schizophrenic inmate who is sane only when forced to take medication is eligible for Death Row" as "his medically induced sanity makes him eligible for execution." Of the eleven **Circuit Judges**, six believe that as this inmate "prefers to be medicated, and because Arkansas has an interest in having sane inmates, the side effect of sanity

should not affect his fate," four feel that "it would be wrong to execute Singleton, who becomes paranoid and delusional when not medicated, and sometimes is still psychotic while medicated," and one abstains. Was there a "single" act of forcing or "tons"? Is Singleton still actually forced or isn't he, or is the forcing just intermittent? Should it matter? Will the **U.S. Supreme Court** accept this case?????? Stay tuned for future episodes. **[26]**

DEATH KNELL SOUNDING FOR DEATH PENALTY? Is the guillotine falling on the black-hooded Axman? Has the death knell begun to sound for the death penalty? In ***Federally Speaking,*** Nos. 17 and 18, we reported on the 7-2 ruling of the **U.S. Supreme Court** that under the **right to trial by jury, as protected by the Sixth Amendment** to the **U.S. Constitution**, only a jury (and not a judge) can impose a death sentence (***Ring v. Arizona***, 536 U.S. 584 (2002)); and the ruling of the **U.S. District Court for the Southern District of New York** that under the **right to due process**, as protected by the **Fifth Amendment,** the death penalty itself is **unconstitutional** ***(U.S. v. Quinones*** (2002 U.S. Dist. Lexis 7320 (SDNY, 2002)), "on the grounds that," according to U.S. District Judge Jed S. Rakoff**,** "innocent people are being sentenced to death 'with a frequency far greater than previously supposed … as DNA testing illustrates'." Indeed, in his concurring opinion in ***Ring,*** Justice Stephen Breyer pointedly observed "the continued difficulty of justifying capital punishment in terms of its ability to deter crime, to incapacitate offenders, or to rehabilitate criminals" (***Ring***, 122 S. Ct. at 2446). Now, building on ***Ring*** and ***Quinones,*** U.S. District Judge William K. Sessions III of the **U.S. District Court for the District of Vermont,** has declared the **Federal Death Penalty Act of 1994 (FDPA)** unconstitutional "on the ground that the **FDPA's §3593(c)'s** direction to ignore the rules of evidence when considering information relevant to death penalty eligibility is a violation of the **Due Process Clause** of the **Fifth Amendment** and **the rights of confrontation and cross-examination** guaranteed by the **Sixth Amendment**" (***U.S. v. Fell***, No. 2:01-CR-12-01, September 24, 2002). As Judge Sessions cautioned: "If the death penalty is to be part of our system of justice, due process of law and the fair-trial guarantees of the **Sixth Amendment** require that standards and safeguards governing the kinds of evidence juries may consider must be rigorous, and **constitutional** rights and liberties scrupulously protected. To relax those standards invites abuse, and significantly undermines the reliability of decisions to impose the death penalty." As reported in ***Federally Speaking,*** No. 19, post-conviction DNA testing has already spared at least 110-convicted murders from the "Axman's" wrath (or pro-longed incarceration). In related matters, all handed down in June 2002, the **U.S. Supreme** Court in a 6-3 ruling, involving a defendant with an IQ of 59, has held that the execution of the mentally retarded is "**cruel and unusual punishment'** under the **Eighth Amendment to the U.S. Constitution**, based on evolving currently prevailing standards of decency (***Atkins* v. *Virginia***, 536 U.S. 304 (2002)); and as noted above in a 7-2 ruling has held that under the **Sixth Amendment right to trial by jury**, only a jury (and not a judge) can impose a death sentence (***Ring v. Arizona***, ***supra)***; though at the same time a sharply divided Court (5-4) ruled that a judge could stiffen a "non-stiff" (non-capital) sentence (***Harris v. United States,*** 536 U.S. 545 (2002)). The debate continues. **[21 & 18]**

WHEN LIFE MEANS LIFE. Nowadays most jurors would expect that one sentenced to life imprisonment could be paroled someday, and, therefore, where the jury found aggravating circumstance, might sentence such a killer to death rather than life imprisonment, if they believed there was any chance he/she might get out on the streets again. In ***Shafer v. South Carolina,*** (532 U.S. 36 (2001)), the **U.S. Supreme Court** found that the failure to instruct the jury that parole was NOT available if the defendant was sentenced to life imprisonment, constituted a denial of due process. Since the jury's only sentencing options were death or life imprisonment, the **U.S. Supreme Court** ruled that such instruction was required to rectify the jury's apparent confusion, especially in view of the jury's clear lack of understanding concerning what a life sentence meant. The trial court's instruction that "life imprisonment meant until the death of petitioner," and counsel's statement that

"petitioner would die in prison," were found to be insufficient to inform the jury concerning the unavailability of parole. **[4]**

NUTS & BOLTS

USA PATRIOT ACT-INSPIRED RULES CHANGES. In an unprecedented action, at least in the last decade, the **U.S. Supreme Court** by a 7-2 vote refused to adopt a proposed **Federal Judiciary Rule** change submitted to it by the **U.S. Judicial Conference**. This proposal was among those drafted by the **Judicial Conference** in conformity with the 9/11 terrorism-inspired **USA Patriot Act**. The proposal was to permit the "video-conferencing" of witness testimony to allow greater access to international witnesses at criminal trials, especially at anti-terrorism trials. Speaking for the majority, Justice Antonin Scalia advised of concerns over violation of the **Sixth Amendment's** right to confrontation. "Virtual confrontation might be sufficient to protect virtual **constitutional** rights," he explained, but "I doubt whether it is sufficient to protect real ones." Proposals that were accepted by the **U.S. Supreme Court** and forwarded to **Congress** for objection, included the permitting of: a) video-conferencing of arraignments and first appearances (so long as defendants consent); b) the disclosure by lawyers of grand jury information to federal law enforcement agents and national security officials upon the filing of disclosure petition **(Rule 6(e) 3C**, which is pursuant to **Section 203 of the Patriot Act**); and c) magistrates issuing search-and-seizure warrants outside their normal areas of jurisdiction **(Rule 41(a),** which is pursuant to **Section 219 of the Patriot Act**). If there are no **Congressional** objections, the new Rules become effective December 1, 2002. **[17]**

FED COURT EX'ED FEDEX! I remember an opposing counsel (let's call him "Clever Cleaver") who was personally fined thousands of dollars by a Chief U.S. District Court Judge for not producing his client's second set of books pursuant to a discovery request. The short and dirty is that we had good reason to believe there was a "double" set of books and vigorously pursued this request. Finally plaintiff's counsel, in an apparent attempt to show "good faith," sent his seemingly displeased "gal Friday" to his client's offices to look for additional records. She returned with one page that was obviously from the second set! When called forward from the back of the Courtroom by the Judge and asked how she obtained that one page, she cleverly cleaved Cleaver with just two words: "I asked." However, Clever Cleaver's story did not end there. Being incensed over the injustice of it all, Cleaver appealed to the **U.S. Court of Appeal**. Affirmed ***per curium***. He then fumed for thirty nights and twenty-nine days, and on the thirtieth day tooketh up his fine honed power pen and hastily slashed out an unstoppable ***Writ of Certiorari*** to the **Highest Fed Court Of the Land**. He then lashed it to his mighty private steed **FedEx d'Pegasus**, who flew it speedily overnight to DC, faster than any first class U.S. postal product could. It arrived bright and early the next day at the portals of the **U.S. Supreme Court** itself, where it was swiftly kicked ***"per clerkium"*** out the door. You see, Clever Cleaver, Esq., had not reckoned with **Part VII of the U.S. Supreme Court Rules of Practice and Procedure**, where **Rule 29** clearly provides that a document is only "timely filed if it is forwarded through a private delivery or courier service and is actually received by the Clerk within the time permitted for filing." Clever, in his haste for speed and/or expediency, again figuratively cleaved himself, this time by employing **Federal Express**, and not the government's **Constitutionally**-blessed molding monopoly, the **U.S. Postal Service**, which had the latter taken the better part of a fortnight, yet still would it have been timely. For as you see, **Rule 29** further states that a "document is timely filed if it is sent to the Clerk through the **United States Postal Service** by first-class mail (including express or priority mail), postage prepaid, and bears a postmark showing that the document was mailed on or before the last day for filing." Daresay, other **Federal Courts** and **Agencies** have similar rules. Poor Clever Cleaver, is he beset with injustices or just ineptnesses? **[26]**

Judicial Erosion – A well-paid Judiciary is a happy Judiciary, and happy Judges make happier Lawyers. Works for me! Presumably, that's why the national Federal Bar Association and the American Bar Association collaborated in preparing a "White Paper" on "Federal Judicial Pay Erosion: A Report on the Need for Reform," which was recently presented by national FBA President Robert McNew and ABA President Martha Barnett, to **U. S. Supreme Court** Chief Justice William Rehnquist. A copy of the report is available to all happy Judges and Lawyers on the FBA web site at www.fedbar.org/wp-judpay.htm. **[2]**

DID YOU KNOW? Did you know that when admitted to the **U.S. Supreme Court Bar** you can obtain a Certificate with or without the words "in the year of our Lord, …". To obtain the "without" version you must "opt out." **[21]**

FED-POURRI™

INSUBORDINATE OR TERMINALLY BLACK? Did Amtrak back Abner Morgan's caboose permanently into the terminal for not following management's orders, or for being terminally black? At trial, Mr. Morgan painted the blacker picture of his termination. He claimed that before he was fired he had suffered racial discrimination for nearly the entire five years he was with Amtrak, testifying that while he had been hired as an electrician, he was referred to as an "electrician's helper;" that his managers used the "N" word; and that he had been reprimanded for not coming to work when his daughter was ill; among other things. Justice Clarence Thomas, the former chief of the **Equal Employment Opportunity Commission** under two Republican presidents, wrote the majority opinion for an otherwise equally divided **(5-4) U.S. Supreme Court**. Abandoning the conservative wing of the **Court**, Justice Thomas give Abner Morgan his day in court by holding that the normal 180-day or 300-day window for commencing litigation under the **Civil Rights Act of 1964** does not close where the employee claims a pattern of unfair treatment. He explained that given "the incidents comprising a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim," which may occur "over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own" for such "claims are based on the cumulative effect of individual acts." ***National Railroad Passenger Corp. v. Morgan,*** 536 U.S. 101 (2002). This term Justice Thomas also departed company from Chief Justice Rehnquist, the sole dissenter, in ***Watchtower Bible and Tract Society Of New York, Inc., v. Village Of Stratton,*** 536 U.S. 536 (2002), where an ordinance making it a misdemeanor to engage in door-to-door solicitation without first registering with the mayor and receiving a permit, was stroke down by an 8-1 majority as being a violation of **free speech** under the **First Amendment** (see **Federally Speaking,** No. 18). What **other** issues will bring out the "Earl Warren" in Justice Thomas? **[19]**

CIRCUITS SPLIT ON RACE AND LAW SCHOOL ADMISSIONS. A prime reason the **U.S. Court of Appeals for the Sixth Circuit**, heard ***Grutter v. Bollinger*** (Case No. 01-1447 and No. 01-1516 (6th Cir. 2002)) ***en banc*** was because of "the 'inevitable conflict' with another federal circuit's opinion in view of the already conflicting decisions of the Fifth Circuit in ***Hopwood v. Texas,*** 78 F.3d 932 (5th Cir. 1996), and 236 F.3d 256 (5th Cir. 2000), and the Ninth Circuit in ***Smith v. University of Washington Law Sch.***, 233 F.3d 1188 (9th Cir. 2000)." By a 5-4 vote, the Sixth Circuit has upheld the **constitutionality** of Michigan Law School using race as a factor in admissions. Chief Judge Boyce Martin, writing for a majority of the Court, asserted that the Law School's admission process was in accordance with the 1978 **U.S. Supreme Court** divided decision in ***Regents of the University of California v. Bakke***, 438 U.S. 265 (1978), where the **High Court** determined that, while quotas to

obtain racial diversity were forbidden, race could be used as a factor in admissions. Thus, Justice Louis Powell, in the only concurring majority opinion, did recognize diversity as a "compelling interest" that promotes "speculation, experiment and creation." Judge Martin, therefore, concluded that: "Because Justice Powell's opinion is binding on this court under Marks v. United States, and because ***Bakke*** remains the law until the **Supreme Court** instructs otherwise, we reject the **District Court's** conclusion [of no compelling state interest] and find that the Law School has a compelling interest in achieving a diverse student body." However, Judge Danny Boggs, in his dissenting opinion asserts that the **Equal Protection Clause** of the **Fourteenth Amendment** governs and by its inclusion "the framers of the **Fourteenth Amendment** decided that our **Government** should abstain from social engineering through explicit racial classifications …The Law School's admissions scheme simply cannot withstand the scrutiny that the **Constitution** demands." As two other **Circuits**, the **Fifth** and the **Eleventh**, also question the current validity of ***Bakke***, while at least one, the **Ninth**, does not, the **U.S. Supreme Court** is in the process of resolving this dispute between **Circuits. [17]**

DOPPELGANGER PROTECTION ACT. Webster defines a doppelganger as "a ghostly copy of a living person." We define it here as a "non-material or 'ghostly' electronic copy of a living (still under **Copyright**) paper article." Justice Ginsburg, writing for the 7-2 majority of the **U.S. Supreme Court**, has rejected the notion that such a "Doppelganger," also know less colorfully as an "electronic database copy," remains covered by the **Copyright** on the print edition of the newspaper or magazine, as being still part of a statutorily permitted revision of that original print edition. She based her finding primarily on the fact that the typical database user, such as LEXIS/NEXIS users, did not retrieve an entire newspaper or magazine, but merely the individual article that was sought. Materializing from the Nether Realm the nebulous "**Doppelganger Protection Act**," the **High Court** therefore held that, without the author's permission, a newspaper or magazine publisher is barred by the **Copyright Act** from distributing such Doppelgangers of its freelance print articles through electronic databases. ***New York Times v. Tasini***, 533 U.S. 483 (2001). **[7]**

INTERNET CENSORSHIP – PAGE Three. Page Three, **Congress'** third attempt to censor the Internet has now unanimously failed before a Three-Judge **U.S. District Court Panel** in Philadelphia, in an opinion written by Chief Judge Edward R. Becker of the **U.S. Court of Appeals for the Third Circuit**, and joined by **U.S. District Court** Judges Harvey Bartle, III and John P. Fullam. An appeal from this panel goes directly to the **U.S. Supreme Court.** As originally reported in **Federally Speaking**, No. 15, the **Children's Internet Protection Act of 2000 (CIPA)** required "libraries to install Internet filtering software in order to receive **Federal** technology funding to provide library users with Internet access." The **Three-Judge Panel**, in issuing a **permanent injunction**, found that: "As our extensive findings of fact reflect, the plaintiffs demonstrated that thousands of Web pages containing protected speech are wrongly blocked by the four leading filtering programs, and these pages represent only a fraction of Web pages wrongly blocked by the programs…. In view of the limitations inherent in the filtering technology mandated by **CIPA**, any public library that adheres to **CIPA's** conditions will necessarily restrict patrons' access to a substantial amount of protected speech, in violation of the **First Amendment**" (see the consolidated cases of ***Multnomah County Library vs. U.S.,*** No. 01-CV-1322, and ***American Library Association vs. U.S.,*** No. 01-CV-1303 (EDPA, 2002)). Page One was the **Communications Decency Act of 1996**, **Congress's** first attempt to control pornography on the Internet, which was thrown out by the **U.S. Supreme Court** as being an **unconstitutional** infringement of **free speech**. The enforcement of Page Two, **Congress's** second attempt, the **Child Online Protection Act of 1998**, has been enjoined pending the decision of **U.S. Supreme** Court. **[17]**

SEC OUT OF THE WOODS! It all started with the Woods in Maryland. The elderly William Wood and his intellectually challenged daughter, Diane Wood Okstulski, had apparently given the

persuasive Maryland broker Charles Zandford, permission to open a joint investment account for them in the amount of $419,255, the discretion to manage the account, and a general power of attorney to engage in securities transactions without their prior approval. By the time Mr. Wood passed away a few short years later, the cupboard was bare. The "zandy" Charlie was found with his hand in the cookie jar and convicted of **federal wire fraud**, for selling **securities** in the Woods' account and making personal use of the proceeds. He was ordered to serve 52 months in **federal prison** and pay $10,800 in restitution by the **U.S. District Court for the District of Maryland** (***U.S. v. Zandford***, Criminal Action No.WN-94-0165 (DMD 1995)). The **Securities and Exchange Commission (SEC)**, to recover the remainder of the stolen funds, then filed a civil suit, alleging violations of **§10 of the Securities Exchange Act of 1934 (Act)** and **SEC Rule 10b-5**, for engaging in a scheme to defraud the Woods and misappropriating their securities without their knowledge or consent. Based on the criminal conviction, the **U.S. District Court** granted the **SEC's** motion for summary judgment in the civil case. But was Charlie's scheme to steal the Woods' assets generally, or was it a scheme to manipulate a particular security? The **U.S. Court of Appeals for the Fourth Circuit** thought this was critical, and so was most critical of the **District Court**. Instead of affirming the **District Court**, this appellate court, finding the former to be true, dismissed the civil complaint, holding that the **federal securities law** does not apply in general fraud cases, which, the **Court** said, have no relationship to market integrity or investor understanding, but only applies to the manipulation of a particular security. Therefore, there was no **§10(b)** violation as neither the criminal conviction, nor the allegations in the civil complaint, established that there was fraud "in connection with the purchase or sale of any security." End of story? Not quite! "I have not yet begun to fight," was the echo from the past of "Justice John Paul Jones" (oops! Stevens). Loading his mighty quill, Justice Stevens wrote for a unanimous **U.S. Supreme Court,** that assuming the **SEC** allegations true, Zanderford's conduct was "in connection with the purchase or sale of any security," for among "**Congress** objectives in passing the **Act** was to ensure honest securities markets and thereby promote investor confidence after the market crash of 1929," by substituting "a philosophy of full disclosure for the philosophy of ***caveat emptor*** and thus to achieve a high standard of business ethics in the securities industry." Here, he then scribed, "the **SEC** complaint describes a fraudulent scheme in which the securities transactions and breaches of fiduciary duty coincide. Those breaches were therefore in connection with the securities sales within the meaning of **§10(b).** Accordingly, the judgment of the Court of Appeals is reversed." ***Securities and Exchange Commission v. Zandford,*** 535 U.S. 813 (2002). An obviously reinvigorated **SEC** "zandily" remarked through its subsequently "devigorated" Chairman Harvey Pitt: "We are gratified that the **Supreme Court** ... endorsed the **SEC's** long-standing position and enabled the **SEC** to continue aggressive enforcement action against brokers who abuse their clients' trust in securities transactions." Yes, the **SEC** now certainly appears to be on its way out of the woods! **[17]**

SUPREMES STRENGTHEN PATENT MONOPOLY. A unanimous **U.S. Supreme Court** recently strengthened the **constitutionally** granted **patent monopoly**. In ***Warner-Jenkinson Co.* v. *Hilton Davis Chemical Co.*** 520 U.S. 17, 29 (1997), the **High Court** had held that competitors could rely on a patent's "prosecution history" to "estop" the patent holder from claiming subject matter under its patent that it had surrendered through the "claims narrowing" amendment process, as a condition of obtaining the consent of the **Patent and Trademark Office (PTO)** to its proposed "pending" patent. Now, in ***Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.,*** 535 U.S. 722 (2002), the **High Court** has backed off from this holding. Justice Anthony Kennedy, writing for a unanimous **Court**, advised that the **U.S. Supreme Court's** revised holding is that "**prosecution history estoppel**" does not bar the asserting of infringement against ***every*** equivalent, and the patentee should have the opportunity to rebut this presumption that "**prosecution history estoppel**" bars a finding of equivalence, by demonstrating that at the time of the claim narrowing one skilled in the art could ***not*** reasonably be expected to have drafted a claim that would have literally encompassed the alleged equivalent. Under the **Doctrine of Equivalents**, one cannot simply take the patented engineering and

design of another, change, for example, a clamp to a screw, and call it new. Festo, a German industrial equipment manufacturer, sued Shoketsu (SMC), a Japanese pneumatics maker, for infringing two of its **patents** for "rodless cylinders." When the patent examiner rejected Festo's patent applications because of alleged defects in description (35 U.S. C. §112), Festo amended the first application by adding a new limitation that the outer sleeve of its "rodless cylinders" would contain "magnetizable" material, and narrowed the claims of both applications by adding a pair of "one-way sealing rings." SMC allegedly eliminated the second ring, by substituting one "two-way sealing ring," eliminated the use of magnetic material in the sleeve, and claimed it as its own. Festo sued, claiming that under the **Doctrine of Equivalents**, SMC's device was so similar as to infringe its patents. The **High Court** reversed the ***en banc*** holding of the **U.S. Court of Appeals for the Federal Circuit** (234 F.3d 558), that "prosecution history estoppel applied" unconditionally, and remanded the case for the lower court to give Festo the opportunity to rebut this presumption**. [17]**

NON-CLASS actors MAY APPEAL. Justice Sandra Day O'Connor, Honorary FBA West Penn Advisory Council Member, writing for the 6-3 majority of the **U.S. Supreme Court,** determined that you need not be acting as a named class member to appeal. In ***Devlin v. Scardelletti***, 536 U.S.1 (2002), the **High Court** found that as non-named "class members are parties to the [**Class Action**] proceedings in the sense of being bound by the settlement," it is required that such "class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing. To hold otherwise would deprive non-named class members of the power to preserve their own interests in a settlement that will ultimately bind them, despite their expressed objections before the trial court." Here petitioner is a retiree who participates in a defined benefits pension plan (the Plan) that was amended in 1991 to add a cost of living increase (COLA). Because its trustees subsequently determined that the Plan could not support the large benefits increases caused by the COLA's, in 1997 its trustees eliminated the COLA and filed a class action in the **U.S. District Court for the District of Maryland**, seeking a **Declaratory Judgment** that the 1997 amendment was binding on all Plan members or, in the alternative, that the 1991 COLA provision was void. The **Sixth Circuit's** affirmance (265 F.3d 195) of the District Court's denial of this right to appeal was reversed. Justice O'Connor appears to have based her reasoning, in part, on "the fact that petitioner had no ability to opt out of the settlement" as it was for a **Declaratory Judgment** (see **Fed. Rule Civ. Proc. 23(b)(1)**). The question, therefore, remains, would the same be true in Class Action proceedings, say for monetary damages, where the non-named class member could have opted out? **[19]**

POLITICS AT BAY. According to Thomas Ferraro of **Reuters**, the **U.S. Supreme Court's** ruling in ***Bush v. Gore,*** 531 U.S. 98 (2000), which was by a divided **Court** allegedly splitting along political and/or ideological lines, "effectively decided the 2000 presidential election in favor of Bush when it refused a request by Democrat Al Gore for a recount of thousands of disputed Florida ballots." No matter whether or not you look upon ***Bush v. Gore*** as a political decision, at least the same cannot be said with regard to the **Supreme Court's** immediate response to the recent New Jersey senatorial ruckus. **Article I, Section IV, Clause 1, of the U. S. Constitution** provides that: "The Times, Places, and Manner of holding Elections for **Senators** and **Representatives**, shall be prescribed in each State by the Legislature thereof." Pursuant to this constitutional mandate, the New Jersey Legislature enacted such election laws and, as it does with all New Jersey legislation, the New Jersey Supreme Court interprets and rules upon them. With regard to the withdrawal, in disgrace, of Senator Robert G. Torricelli as the Democratic U.S. Senatorial candidate less than 35 days prior to the election, the New Jersey Supreme Court ruled that the substitution of former U.S. Senator Frank Lautenberg was permissible, "having concluded that the equitable relief sought herein is not inconsistent with the precedent of this Court and the terms of the statute," that "N.J.S.A. 19:13-20 does not preclude the possibility of a vacancy occurring within fifty-one days of the general election," and that "the Court

should invoke its equitable powers in favor of a full and fair ballot choice for the voters of New Jersey" (***The New Jersey Democratic Party, Inc. V. Samson, N.J. Attorney General*** (NJ Sup Ct, A-24 Sept Term 2002, No. 53,618, Oct 2. 2002)). In response to the Republican's again baying to the **U.S. Supreme Court** to hold the Democrats at bay, the **High Court** issued the following "Order in Pending Case … The application for stay presented to Justice Souter and by him referred to the Court is denied" (***Forrester v. New Jersey Democratic Party, Inc.*****, No.** 02A289, 537 U.S.___ (2002)). It waits to be seen if there will be more such barking, baying and holding at bay; or if we can returning to those idyllic imaginary days of living like a Bey in opulent bay robes, with brimming bays, bountiful bay leaf buns, sunny bay windows, balmy bay views, splashes of bay rum, and old Bay at bay at the bayberry bush. Or better yet, viewing some bodaciously audacious re-runs of ***Bay Watch*** (but, perchance, that's just what we're already doing!). **[22]**

JEFFERSON ON THE CHURCH & STATE "WALL." "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should '**make no law respecting an establishment of religion, or prohibiting the free exercise thereof,**' thus building a ***wall*** of separation between Church & State. … That society shall here know that the limit of its rightful power is the enforcement of social conduct; while the right to question the religious principles producing that conduct is beyond their cognizance." **Thomas Jefferson's** letters to the Danbury and Delaware Baptist Associations of January 1, 1802 and July 2, 1801, citing the **First Amendment to the U.S. Constitution** (emphasis added). The strength of **Jefferson's Wall** has wavered from time to time. In most recent times, the **U.S. Supreme Court** has both sharply intensified its strength by banning all public school sponsored prayer, and de-intensified it a bit by permitting states to adopt school voucher programs where there is a non-religious valid public purpose for so doing, even if most of the funds may find their way to the coffers of religious schools. The former was just two years ago in the 6-3 school sporting events decision in ***Santa Fe Independent School District v. Doe***, 530 U.S. 290 (2000): "The policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events." The latter this year in the nearly split 5-4 school voucher decision in ***Zelman V. Simmons-Harris***, 536 U.S. 639 (2002). Now a new test of **Jefferson's Wall** has exploded on the scene. A three-judge panel of the **U.S. Court of Appeals for the Ninth Circuit**, by a 2-1 majority, has found the phrase "under God" in public school recitations of the **Pledge of Allegiance** to be **unconstitutional,** as taking the **Pledge** from the secular side of **Jefferson's Wall** where it had resided for its first for 62 years. The historical prospective is that there was no **Pledge of Allegiance** until 1892, when socialist clergyman and editor Francis Bellamy wrote for ***The Youth's Companion*** the original "Godless" generic **Pledge of Allegiance**: "I pledge allegiance to my flag and to the Republic for which it stands: one nation, indivisible, with liberty and justice for all." (The word Bellamy really wanted to add, but was dissuaded from, was "equality" not "God.") Sixty-two years later, during the era of the Cold War and McCarthyism, Congress inserted "under God" (but not "equality") into the Pledge, primarily through the efforts of the Knights of Columbus, a Catholic men's club, to distinguish the Pledge from similar rhetoric used by the so-called "godless communists." According to the Panel's opinion, written by Circuit Judge Alfred T. Goodwin, inserting "under God" is as **unconstitutional** as inserting "we are a nation `under Jesus,' a nation `under Vishnu,' a nation `under Zeus,' or a nation `under no god,' because none of these professions can be neutral with respect to religion," and, therefore, would be a government endorsement of religion in violation of the **First Amendment**. And according to Susan Jacoby in ***Newsday***, at the 1787 Constitutional Convention our founding fathers extensively debated using the word "God" in the **U.S. Constitution** "and the secularists prevailed." But, by Zeus, we have yet to hear from the full **Ninth Circuit** or the **U.S. Supreme Court**. [18]

CHECKS AND BALANCES WERE AT WORK. According to the American Immigration Lawyers Association (AILA), the **Illegal Immigration Reform and Immigrant Responsibility Act of 1996** (IIRIRA) and the **Anti-Terrorism and Effective Death Penalty Act of 1996** (AEDPA) "subject long-time lawful permanent residents to deportation for minor offenses that may have occurred years in the past…. Under the **1996 laws**, immigrants routinely are detained without bond, deported without consideration for discretionary relief, restricted in their access to counsel, and barred from appealing to the courts.… Low-level immigration officials act as judge and jury, and the **Federal Courts** lack the power to review most deportation decisions and **INS** activities." But times may have been a changing. Shortly before 9/11 the **U.S. Supreme Court** found **habeas corpus** proceedings still available to such immigrants because **Congress** had not clearly stated its intent to foreclose all **habeas** review, which would be necessary in light of the serious constitutional questions that any such effort would raise under the **Suspension Clause** (***INS v. St. Cyr,*** 533 U.S. 289 (2001)); rejected the government's assertion that the **INS** can indefinitely detain aliens who have been found deportable but are unlikely to be deported in the reasonably foreseeable future, either because their foreign citizenship cannot be clearly established or because their country of origin is unwilling to accept them (***Zadvydas v. Davis***, 533 U.S. 678 (2001): "A statute permitting indefinite detention of an alien would raise serious constitutional problems"); and refused to apply a provision of the 1996 law retroactively, absent a clear indication from **Congress** that it was meant to apply retroactively. Then, too, legislative attacks are being mounted in **Congress,** such as Representative Bob Filner's (D-CA) proposed "H.R. 87, the **Keeping Families Together Act of 2001**, which [according to the AILA] would address many of the problems that have resulted from the **1996 laws** [the **IIRIRA** and the **AEDPA**]." Indeed, in compliance with the **High Court's** Ruling the **INS** had advised it was releasing 359 such detainees, and even **President Bush** had announced that he wanted up to 3 million illegal Mexican residents granted legal status. **[7]**

PASS THE FIFTH! The **U.S. Supreme Court** recently summarily reversed a judgment of the Ohio Supreme Court that had held that the **Fifth Amendment** privilege against self-incrimination did not apply to witnesses who claim to be innocent. "To the contrary," the **High Court's** unanimous ***per curium*** opinion stated, "one of the **Fifth Amendment's** basic functions . . . is to protect ***innocent*** men . . . who otherwise might be ensnared by ambiguous circumstances" (***Ohio v. Reiner***, 532 U.S. 532 (2001); emphasis ***in*** original). [7]

HOW KNOW BROWN COW? Recent **U.S. Supreme Court Fourth Amendment** decisions, according to some commentators, have not exhibited any discernable pattern. For example, the **High Court** has ruled that police ***may stop*** drivers for burnt-out taillights or for not wearing seat belts and then arrest them without a warrant, the effect of which is to permit "a legal search incident to the arrest" (***Atwater v. Lago Vista,*** 532 U. S. 318 (2001)). But, because of the lack of a warrant, police ***may not just stop*** cars at roadblocks for the purpose of searching them for drugs (***Indianapolis v. Edmond,*** 531 U. S. 32 (2000)). But, then again, according to dicta in the pre-9/11 warrant-less stop case of ***Indianapolis v. Edmond, supra***, the police my establish roadblocks because of emergency conditions not generally present in narcotics checkpoints, such as to "thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route." Simple, you may say, you need a prerequisite offense, no matter how slight, or emergency conditions, before there can be a warrant-less search. How about police ***being permitted*** to detain an individual outside of his trailer home for two hours while they obtain a search warrant based on the suspicion of drugs being present within the home (***Illinois v. McArthur***, 531 U. S. 326 (2001)); while ***not permitting*** police, without a warrant, to aim a heat-detecting devices at a home, from outside the home, to detect the presence of heat readings in or about the home indicative of drug related activities (***Kyllo v. United States***, 533 U. S. 27 (2001)), or to test pregnant women for drugs in a public hospital, even for the asserted special purpose of

protecting fetal health (***Ferguson v. Charleston***, 532 U. S. 67 (2001)). The bottom line appears to be that the **High Court** is sending a signal to law enforcement that search warrants are still necessary, laudable motives not withstanding (in the detainee case a warrant was actually obtained), unless there has been a lawful arrest, even if it only be a mere "custodial arrest" for a fine-only offense, or an emergency. So then "again" again, "how now brown cow?" **[6]**

ARBITRATE OR RUINATE – The **United States Supreme Court** ruined the chances of a Circuit City employee having his discrimination suit heard by a Court of Law, when it ruled that, under the Federal **Arbitration Act of 1925** (9 U. S. C. §1), he was bound by his written agreement in his employment contract to "settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, ***exclusively*** by final and binding ***arbitration*** before a neutral Arbitrator [emphasis in original]. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the **Age Discrimination in Employment Act**, **Title VII of the Civil Rights Act of 1964**, as amended, including the amendments of the **Civil Rights Act of 1991**, the **Americans with Disabilities Act**, the law of contract and the law of tort." ***Circuit City Stores, Inc v. Adams,*** 532 U.S. 105 (2001). **[3]**

COPYRIGHT UNLIMITED. The **U.S. Supreme Court decided** this term that "the author's life plus 70 years" is within the "limited" **copyright** contemplated by the **U.S. Constitution**. Thus, even under this extended term that can significantly exceed 120 years, the **Constitution,** though not all its **Amendments,** has outlived its copyright, if any, though not its usefulness. But what of the **Bible's copyright,** if any? Unlimited many may say! ***Eldred v. Ashcroft,*** No. 01–618, 537 U.S. ___ (2003). **[24]**

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POST SCRIPT: To some readers certain of our news items may appear to be incredible or incredulous. However, Federally Speaking just reports on the Federal legal scene. Will Rogers succinctly summed it up when he quipped: "I don't make jokes. I just watch the government and report the facts." **[17]**

BACK ISSUES. This column often carries stories continuous in nature, and may "bring issues back" or even "back into issues." To aid in getting the "whole story," the **U.S. District Court for the Western District of Pennsylvania** has graciously made all back issues of ***Federally Speaking*** available on their web site at http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm. The column numbers and the bracketed [ ] numbers refer to the column numbers in the ***Federally Speaking Index*** on the WDPA website. **[24]**

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*This **Special Compilation Issue** of the editorial column* **Federally Speaking** *brings together, with a modicum re-editing, most of the **U.S. Supreme Court** related items covered in the first 26 issues. The purpose of* **Federally Speaking** *is to keep you abreast of what is happening on the Federal scene, with the threefold objective of being educational, thought provoking, and entertaining.* ***The views expressed are those of the persons they are attributed to and are not necessarily the views of the FBA, this publication or the author.*** *Please send any comments and suggestions you may have, and/or requests for information on the **Federal Bar Association** to: Barry J. Lipson, Esq., FBA Third Circuit Vice President, at the Law Firm of Weisman Goldman Bowen & Gross, 420 Grant Building, Pittsburgh, Pennsylvania 15219-2266. (412/566-2520; FAX: 412/566-1088; E-Mail: blipson@wgbglaw.com).*